Sup Court U.S.
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No. 10-1271

In The
# Supreme Court of the United States

BILLY WAYNE COBLE,

*Petitioner,*

v.

THE STATE OF TEXAS,

*Respondent.*

**On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals**

## RESPONDENT'S BRIEF IN OPPOSITION

ABELINO 'ABEL' REYNA
Criminal District Attorney
McLennan County, Texas

MICHAEL JARRETT
First Assistant

ALEX J. BELL
Assistant
Appellate Division

JOSEPH LAYMAN*
Assistant
219 N. 6th St., Suite 200
Waco, Texas 76701
(254) 757-5084
joe.layman@co.mclennan.tx.us

*Counsel of Record

*Counsel for Respondent*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## CAPITAL CASE

## QUESTIONS PRESENTED – RESTATED

The questions presented as restated by Respondent are:

1. Did the Texas Court of Criminal Appeals correctly apply this Court's holding in *Barefoot v. Estelle* that a challenge to the entire field of expert testimony on future dangerousness had been rejected or does the Eighth Amendment require state courts to apply some other standard of review than those found in their normal rules of evidence and procedure for erroneously admitted expert testimony in a capital case?

2. Does the Texas future dangerousness scheme on capital sentencing, as approved by *Jurek v. Texas*, violate the Eighth Amendment by having jurors consider an individual's character for violence?

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## INTRODUCTION

Petitioner, Billy Wayne Coble, abused his third wife, Karen Vicha, both physically and verbally, before she decided to leave him. After hearing the news, Petitioner made threats, kidnapped Karen at knifepoint before releasing her, and murdered her dog before turning his rage towards her family. On August 29, 1989, Petitioner murdered Karen's mother, father, and her brother before kidnapping and attempting to murder her.

## PROCEDURAL HISTORY

Petitioner was sentenced to death by a jury in 1990. The Texas Court of Criminal Appeals affirmed. This Court denied the petition for certiorari. The Fifth Circuit Court of Appeals granted habeas relief in 2007. Petitioner was retried on punishment only in 2008. The jury sentenced him to death. The Court of Criminal Appeals affirmed. Petitioner filed an Application for Habeas relief from the Court of Criminal Appeals, which is currently pending, and now this Petition for Writ of Certiorari.

In affirming the 2008 sentence of death, the Court of Criminal Appeals found that the State had not met its burden under the Texas Rules of Evidence and *Kelly v. State* to support admission of the testimony of its future danger expert, Dr. Coons. However, the court found such error to be harmless in light of all the other punishment evidence presented and the

nature of Dr. Coons's "common sense" opinions. The standard of review for such evidence in Texas is the same as any other erroneously introduced evidence under Rule 44.2 of the Texas Rules of Appellate Procedure.

## FACTS OF THE CRIME

Petitioner was upset that Karen Vicha had reported an incident to police, where he kidnapped her at knife-point, and had him arrested. After Petitioner was released from jail, he went to confront Karen and waited at her house for her to return home from work. Some of the Vicha children came home first, so he bound and gagged them. Growing impatient and worried that he would be discovered, Petitioner went to the other Vicha residences[1] and killed Karen's mother, father, and brother, a Waco Police Officer, with multiple gunshots. He shot each victim in the head at least once. When Karen Vicha arrived home, she found Petitioner waiting for her with the children bound on the floor. He taunted Karen, telling her how he killed her brother, father, and mother and that there was no one left to help her. Concerned for the children, Karen was able to convince Petitioner to leave with her.

[1] The extended Vicha family lived in residences in close proximity on the same street in the town of Axtell, Texas.

Petitioner told Karen he was going to kidnap her and torture her for a few weeks. After they were in the car, he proceeded to pistol whip her until there was so much blood in her eyes that she could not see. He stopped in a field where he threatened to rape her. While they were in the car, he continuously alternated putting his hand between her thighs and holding a knife to her throat. He also used the knife to cut her face. The kidnapping ended only when local authorities gave chase and Petitioner crashed the vehicle he and Karen were in—an attempt at a murder-suicide.

Petitioner was convicted of murder for the deaths of Bobby Vicha, Robert Vicha, Sr., and Zelda Vicha. He was also charged with, but never prosecuted for, the kidnapping and attempted murder of his wife, Karen Vicha.

During the punishment phase of both trials, jurors heard evidence that Petitioner had physically abused Karen and his two previous wives. They also heard about his molestation of several young girls. Prosecutors introduced a mental evaluation performed when Petitioner was a teenager, which showed a total lack of respect for women with an exhibition of sociopathic tendencies. That evaluation turned out to be prophetic.

## STATEMENT OF THE CASE

Petitioner asks this Court to review a case that was decided on state-law grounds and in accordance with this Court's holding in *Barefoot v. Estelle*. The Texas Court of Criminal Appeals held that the trial court erred in allowing the testimony of Dr. Coons, the State's expert on future dangerousness, because the State did not carry its burden to qualify him as an expert. Recognizing the error, the Court of Criminal Appeals applied the harm analysis found in Texas Rule of Appellate Procedure 44.2(b) and found the error harmless. The court further held that *Barefoot* forecloses an Eighth Amendment challenge to the field of expert testimony on future dangerousness as a whole.

The standard set forth in *Barefoot* does not require any special or heightened level of review for erroneously admitted evidence, expert or otherwise. Given the opportunity in other cases, this Court has repeatedly refused to create different standards for the admission of evidence for the State in capital cases on Eighth Amendment grounds and should not do so now.

Second, there is no evidence that the future dangerousness framework approved in *Jurek v. Texas* has changed or that it was misapplied in this case. This Court has consistently held that the jury should consider the character of a defendant when making their determination of punishment and deciding issues of mitigation. Petitioner also claims Texas

somehow bound itself to applying the future dangerousness inquiry without considering a defendant's character for violence, however the *Jurek* decision never referenced this argument from the State's brief and did not rely upon it in the opinion.

## SUMMARY OF ARGUMENT

Rather than alleging a violation of existing law or precedent, Petitioner asks this Court to adopt the dissenting view from *Barefoot v. Estelle*. This minority view advocates that the Eighth Amendment requires some vague and unidentified heightened-reliability requirement for expert testimony in capital-sentencing proceedings. However, the majority opinion from *Barefoot* expressly states that there is no constitutional barrier to applying the normal rules of evidence in admitting or excluding expert testimony. More recent cases from this Court have reached the same conclusion. After conducting a harm analysis under this standard, the Texas Court of Criminal Appeals found the erroneous admission of expert testimony to be harmless. Petitioner asks this court to adopt a per-se harm rule for erroneously admitted expert testimony because he cannot establish harm in this case without it.

Second, Petitioner misinterprets *Jurek* as requiring the State to prove some future specific act of violence rather than show an accused's violent character through past crimes or the nature of the crime

for which he is currently on trial. Nothing in *Jurek* supports Petitioner's position that this character evaluation must be performed "in reality, not in the abstract." In fact, *Jurek* notes with approval that courts and juries around the country routinely make predictions about future dangerousness based upon a defendant's character when making decisions about probation, bail, etc. Character is an essential consideration, both in determining mitigation and future dangerousness.

Because the decision of the Texas Court of Criminal Appeals was resolved on state-law grounds and in accordance with the precedents of this Court, further review is not warranted.

## REASONS FOR DENYING THE PETITION

### I. THE TEXAS COURT OF CRIMINAL APPEALS CORRECTLY APPLIED THIS COURT'S PRECEDENT FROM *BAREFOOT*.

Petitioner argues that whatever the accepted standard for the reliability of expert testimony in most criminal cases, the Eighth Amendment demands special evidentiary rules and a higher standard of review for error in a capital case. This is not the law and Petitioner's arguments to the contrary are unsupported by this Court's prior decisions.

### A. The CCA[2] correctly interpreted *Barefoot* as foreclosing any argument that expert testimony on future dangerousness fails to meet the heightened reliability requirement of the Eighth Amendment.

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), this Court relied upon three essential holdings that are relevant to this case:

1. There is nothing inherent in the field of expert forensic psychology that prohibits the entire field from testifying on the special issue of future dangerousness in a capital case. *Id.* at 896-897, 889-901.

2. The standard use of hypothetical questions is acceptable when questioning such experts. *Id.* at 903.

3. There is no constitutional barrier to applying ordinary rules of evidence governing the use of expert testimony in cases involving the death penalty. *Id.* at 904-905.

The CCA agreed with Petitioner that Dr. Coons's testimony should not have been admitted. However, the admission was found to be harmless. The erroneous admission of irrelevant or prejudicial evidence, even in a capital case, does not automatically require

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[2] For the sake of readability, the Texas Court of Criminal Appeals will be referred to as the CCA throughout the Argument section.

reversal. "That the evidence may have been irrelevant as a matter of state law, however, does not render its admission federal constitutional error." *Romano v. Oklahoma*, 512 U.S. 1, 11 (1994), *citing Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Courts are required only to apply their regular rules of evidence.

In his direct appeal, Petitioner contended that the whole of expert testimony regarding future dangerousness violates the Eighth Amendment and should be categorically excluded. The CCA summarily denied Petitioner's Eighth Amendment claim because this Court had already rejected it in *Barefoot*. By summarily dismissing this global challenge, the CCA neither expanded this Court's holding in *Barefoot*, nor dismissed the specific constitutional challenge to the testimony of Dr. Coons in this case. The court performed a lengthy harm analysis under Texas Rule of Appellate Procedure 44.2(b) for the erroneous admission of evidence, just as directed by this Court in *Barefoot*. That analysis looks at whether Petitioner's substantial rights were affected by the error and mandates reversal if there was any harm. Thus the CCA evaluated both of Petitioner's arguments, including his objection to expert testimony on future dangerousness as a whole and the erroneous admission of Dr. Coons's testimony specifically in this case.

### B. The CCA correctly applied the Texas Rules of Evidence and the Texas Rules of Appellate Procedure in determining that the admission of Dr. Coons's testimony was harmless and did not affect his substantial rights.

The standard for reviewing evidentiary error in Texas safeguards against constitutional violations. Because the Texas Rules of Appellate Procedure require the appellate courts to consider whether a defendant's substantial rights have been violated, the possibility of a constitutional violation is always considered. In Texas, evidentiary errors in criminal cases are reviewed under Texas Rule of Appellate Procedure 44.2. Any error not affecting substantial rights is to be disregarded. TEX. R. APP. P. 44.2(b).[3] The CCA has adopted the test set forth in *Kotteakos v. United States*, 328 U.S. 750 (1946) as the standard for determining when substantial rights have been violated and reversal warranted. *Haley v. State*, 173 S.W.3d 510, 518 (Tex. Crim. App. 2005).[4] Therefore, in its analysis of the harm from the wrongfully admitted evidence, the rule requires the CCA to consider whether the admission of the evidence violated Petitioner's substantial rights. If Constitutional rights

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[3] The Texas rule is almost identical to the federal standard. *See* 28 U S C. § 2111, *Chapman v California*, 386 U.S. 18, 22-24 (1967).

[4] "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *Haley*, 173 S W.3d at 518.

are violated, then Rule 44.2(a) applies and the State must prove the error harmless beyond a reasonable doubt.

State courts are not required to apply anything more than the regular rules governing the admission of evidence in capital punishment trials. "[T]he States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished. This latitude extends to evidentiary rules at sentencing proceedings." *Romano*, 512 U.S. at 7. *Barefoot* establishes the standard for whether the admission of unreliable expert testimony in a particular case violates the Constitution: the regular rules of evidence. *See Barefoot*, supra. This is exactly what the CCA did.

Petitioner argues that the CCA's opinion means that wrongful admission of expert testimony would never result in an Eighth Amendment violation. While the Eighth Amendment provides some limitations on capital sentencing, it is not a universal ground of review for any evidentiary error which may have occurred during trial. States are free to apply their own rules of evidence and appellate review to evidentiary errors. These rules and statutes provide sufficient protection and this Court has refused to create a new federal standard under the Eighth Amendment to supersede them.

### C. There is no special or heightened level of review for the erroneous admission of evidence in capital cases, expert or otherwise.

Next, Petitioner urges that Eighth Amendment jurisprudence requires some enhanced level of review for the erroneous admission of evidence. Respondent can locate no such requirement. In fact, this Court has stated explicitly that the Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings. *Romano v. Oklahoma*, 512 U.S. at 11-12, *citing Payne v. Tennessee*, 501 U.S. 808, 824-825 (1991).

Petitioner's argument merely repeats a minority opinion. Justices Brennan and Marshall joined Justice Blackmun's *Barefoot* dissent and advocated for a requirement of greater reliability of evidence in capital cases, but that dissent is not the law. *Barefoot*, 463 U.S. at 924-929. In *Barefoot* and *Romano*, the majority held that there is no constitutional barrier to applying the normal rules of evidence in a capital case. *Barefoot*, 463 U.S. at 904-905; *Romano*, 512 U.S. at 11-12. Therefore, it was proper for the CCA to conduct its harmless error review under the regular rules for erroneously admitted evidence. That Petitioner disagrees with the result is not a ground for review in this Court.

This Court's Eighth Amendment jurisprudence regarding the death penalty has focused on ensuring fair procedure.

> "In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty." *California v. Ramos*, 463 U.S. 992, 999 (1983) (emphasis in original) (referring to the wholesale review of the capital punishment schemes used by several states).

In an effort to ensure fairness, this Court has consistently lowered the evidentiary threshold for defendants to admit mitigating evidence. State capital sentencing laws and instructions to jurors must ensure that jurors consider this mitigating evidence.

Petitioner asks this court to fashion general evidentiary rules, which would govern the admissibility of evidence at capital sentencing proceedings, under the guise of interpreting the Eighth Amendment. This Court has declined this invitation in the past and should decline to hear this case as well. *See Payne*, 501 U.S. at 824-825. Creating such rules would undermine longstanding principles of federalism and our constitutional system, where each State maintains sovereign authority to prescribe the specific manner in which it will try and punish those that violate state law. This Court has a lengthy history of granting the States wide "latitude to prescribe the method by which those who commit murder shall be

punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990).

Petitioner's argument also relies upon the false assumption that the Eighth Amendment is a defendant's only protection from unreliable expert testimony. Both the Texas and Federal Rules of Evidence have specific provisions governing the admission of expert testimony and both jurisdictions have extensive case law governing the admission of expert testimony. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992); *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998). State and Federal law also provide the standards of review for evidentiary errors, including those of constitutional magnitude. These laws sufficiently protect defendants' rights.

### D. The authorities relied upon by Petitioner are all distinguishable from this case.

First, Petitioner's reliance on *Johnson v. Mississippi*, 486 U.S. 578 (1988), is misplaced. The Court emphasized in *Johnson* that decisions in capital cases cannot be predicated on mere 'caprice' or on factors that are constitutionally impermissible or totally irrelevant to the sentencing process. *Id.* at 584-585. There, the only evidence supporting an aggravating factor necessary to impose the death penalty turned out to be invalid—a prior murder conviction that was overturned on appeal. The evidentiary error only violated the Eighth Amendment because it

invalidated the aggravating factor. *Johnson* does not stand for the proposition that the mere admission of irrelevant and prejudicial evidence requires the overturning of a death sentence. *Romano*, 512 U.S. at 11. In *Romano*, this Court rejected an argument identical to Petitioner's, holding that even improper admission of a prior sentence of death could be rendered harmless evidentiary error. *See id.*

Second, the case of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), is distinguishable in the Eighth Amendment context because the prosecutor unambiguously and strongly misled the jury to believe that the responsibility for sentencing the defendant to death was not in their hands. *Id.* at 340. The jury must not be misled regarding the role it plays in the sentencing decision. *Id.* at 336. Such remarks by the prosecutor impermissibly minimized the jury's sense of responsibility for determining the appropriateness of death. *Id.* at 341. There was no prosecutorial misconduct in the instant case.

Finally, Petitioner relies on *Oregon v. Guzek*, 546 U.S. 517, 525 (2006) to argue that evidence in a capital case should be scrutinized with heightened reliability and accuracy. However, the ruling in *Guzek* dealt with a defendant's argument that he had an Eighth Amendment right to present evidence casting residual doubt on the finding of guilt during the punishment phase of his capital trial. Rejecting that argument, this Court held that the States retain authority to set reasonable limits upon the mitigation evidence a defendant can submit, and to control the

manner in which it is submitted in an effort to achieve a more rational and equitable administration of the death penalty. *Id.* at 526. That case presented a different question and provides no support for Petitioner's argument.

In conclusion, this Court should deny the petition because the CCA resolved the evidentiary issue on state-law grounds and in accordance with this Court's precedents. The CCA did not extend the holding in *Barefoot*; it was applied correctly. Petitioner's arguments to adopt dissenting opinions and fundamentally alter this Court's Eighth Amendment jurisprudence show that there are no grounds for this Court to review this case.

## II. THE FUTURE DANGEROUSNESS FRAMEWORK ENACTED BY TEXAS TO DETERMINE CAPITAL SENTENCING IS CONSTITUTIONAL.

There is nothing new, hypothetical, or conjectural about the State's future dangerousness test as it was applied to Petitioner. In *Jurek*, this Court considered the future-dangerousness special issue and approved of its use in Texas' capital sentencing scheme. *Jurek*, 428 U.S. at 273-274. For a jury to make an affirmative finding on future dangerousness, the only requirement is that there must be a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. TEX. CODE CRIM. PROC. art. 37.0711 Sec. 3(b)(2). Nothing

in *Jurek* or Texas law limits application of the special issue to mere incapacitation by incarceration.

Petitioner argues that "incapacitation addresses danger in reality, not in the abstract." Pet. Br. at 30. The future dangerousness test is not merely about incapacitation by incarceration. This Court has never limited the application of Texas' future dangerousness special issue in that way. Instead, jurors are called upon to assess defendant's present character for future dangerousness and are allowed to consider the entirety of the evidence before them when coming to their conclusion, including the prison environment where they are incarcerated. There is no reason now to revisit that issue when the test—which has not changed in its wording or application—comports with this Court's capital sentencing jurisprudence.

Petitioner also ignores the reality that he was eligible for parole at the time of his retrial on punishment. At the time Petitioner committed his offense, the sentencing options were death or life with the possibility of parole. Act of May 25, 1987, 70th Leg., R.S., ch. 385, § 5, 1987 Tex. Gen. Laws 1887, 1889. Life without the possibility of parole was not an available sentencing option for capital murder in Texas until 2005. TEX. PENAL CODE ANN. § 12.31 (Vernon Supp. 2010), *codifying* Act of May 28, 2005, 79th Leg., R.S , ch. 787, § 1, 2005 Tex. Gen. Laws 2705, 2705. At the time the offense was committed, an inmate serving a life sentence was parole-eligible after serving 15 years of a life sentence, and a 'full' life sentence was 60 years. Act of May 25, 1987, 70th

Leg., R.S., ch. 385, § 5, 1987 Tex. Gen. Laws 1887, 1889. Therefore, there was nothing abstract about a determination of future dangerousness where a life sentence could have resulted in Petitioner's near-immediate release from prison if given a life sentence.

Additionally, a defendant's character for violence is an appropriate consideration when deciding if there is a probability that an individual will commit future acts of violence. This Court has consistently held that the character of a defendant must be considered by the jury when assessing the death penalty. "States must ensure that capital sentencing decisions rest on [an] individualized inquiry, under which the character and record of the individual offender and the circumstances of the particular offense are considered." *Romano*, 512 U.S. at 7, *citing McCleskey v. Kemp*, 481 U.S. 279, 303 (1987). Character is frequently used in criminal cases and this Court has often referred to it as a necessary consideration in capital sentencing. The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing appropriate punishment. *See Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Barclay v. Florida*, 463 U.S. 939, 948-951 (1983). Such determinations are routine.

Petitioner also suggests that his good conduct in prison is determinative of the issue of future dangerousness. However, the jury is not required to focus on any one fact or piece of evidence presented, like

behavior in jail. The CCA has approved a non-exclusive list of factors a jury may consider when determining future dangerousness:

(1) the circumstances of the capital offense, including the defendant's state of mind and whether he was acting alone or with other parties;

(2) the calculated nature of the defendant's acts;

(3) the forethought and deliberateness exhibited by the crime's execution;

(4) the existence of a prior criminal record and the severity of the prior crimes;

(5) the defendant's age and personal circumstances at the time of the offense;

(6) whether the defendant was acting under duress or the domination of another at the time of the commission of the offense;

(7) psychiatric evidence; and

(8) character evidence.

*Keeton v. State*, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987). In the appropriate case, the circumstances of the offense alone may warrant an affirmative answer to the future dangerousness special issue. *Sonnier v. State*, 913 S.W.2d 511, 517 (Tex. Crim. App. 1995).

The jurors deciding Petitioner's retrial on punishment were certainly allowed to question his motives

for his allegedly good behavior in prison. Death row prisoners with appeals pending have a strong incentive to behave. Their very life may depend upon it. Jurors were also allowed to consider the possibility of Petitioner's release from his life sentence or that given a life sentence he would commit acts of violence in prison once all his appeals were exhausted. There is no error in using a long history of violence towards others, even given a period of seemingly peaceful behavior, in deciding that an individual poses a future danger.

Petitioner also misquotes and misinterprets *Gregg v. Georgia*, 428 U.S. 153 (1976). Pet. Br. at 34. When laying out the requirements for a capital sentencing scheme, the full quotation is as follows:

> "In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Id.* at 195.

When the Court was speaking of "information and guidance," it was referencing the requirement that state law must allow for mitigation evidence to be

presented and that the law must ensure that jurors consider such information, not "specific and detailed guidance" on how jurors are to determine if a defendant is a future danger. Petitioner errs by commingling Court's aggravating factor jurisprudence with those cases that require a jury to consider mitigating evidence when assessing the death penalty.

The Texas capital sentencing scheme complies with *Gregg* by separating out aggravation, future dangerousness, and the consideration of mitigation evidence. In Texas, the aggravating factors are limited in number and specifically detailed by statute. TEX. PENAL CODE ANN. § 19.03 (Vernon 2003). The aggravating factor is found by the jury's verdict of guilt. The future dangerousness special issue, decided during punishment, is the vehicle by which Texas juries consider mitigation evidence. *Jurek v. State*, 522 S.W.2d 934, 939-940 (1975). However, in response to the *Penry* line of cases from this Court, Texas added an additional question during punishment which asks the jury to consider all of the evidence and decide if there is a sufficient mitigating circumstance to warrant life imprisonment instead of death.[6] *See* TEX. CODE CRIM. PROC. art. 37.0711 Sec. 3(e); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Penry v. Johnson*, 532 U.S. 782 (2001).

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[6] Petitioner was granted habeas relief because the special issues submitted to the jury during the punishment phase of his trial were not in accord with the holdings from *Penry I* and *Penry II*. *See Coble v. Quarterman*, 496 F.3d 430 (5th Cir. 2007).

This case is not an ideal vehicle for considering Texas' death penalty scheme because Texas Code of Criminal Procedure article 37.0711 has been modified since the decision in *Jurek* to include a special question solely on mitigation. The law directs jurors to consider, among other things, the defendant's character and background. Now, defendants have the added protection of a specific question on mitigation and a more direct question to jurors about which sentence they wish to impose, offering instead the option of life without parole, which was not an option at the time Petitioner murdered the victims in this case.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ABELINO 'ABEL' REYNA
Criminal District Attorney
McLennan County, Texas

MICHAEL JARRETT
First Assistant

ALEX J. BELL
Assistant
Appellate Division

JOSEPH LAYMAN*
Assistant
219 N. 6th St., Suite 200
Waco, Texas 76701
(254) 757-5084
joe.layman@co.mclennan.tx.us

**Counsel of Record*

*Counsel for Respondent*